Overstreet, Greg (ATG)

From: nancy.craver@seattle.gov
Sent: Tuesday, January 03, 2006 12:52 PM
To: Overstreet, Greg (ATG)
Subject: Public Record Comments

The following message was submitted to the Office of Attorney General:

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Comments:

January 3, 2006 Attorney General Rob McKenna Office of the Attorney General 1125 Washington St SE PO Box 40100 Olympia, WA 98504-0100 Dear Attorney General McKenna, Thank you for your continued attention to the State of Washington's public disclosure laws. In 2005 you supported the amendment of the state's public disclosure act to allow the Attorney General's office to draft advisory rules and guidelines for agencies in their application of the act. The City of Seattle appreciates the opportunity to comment on the model rules for application of the public disclosure act. The following are our comments and recommendations. Definitions are needed for public records request The difference between the terms "overbroad", "unclear", and "identifiable" needs to be clarified. The Revised Code of Washington (RCW) provides that agencies shall not deny a request for identifiable records solely on the basis that a request is "overbroad." However, an agency may request clarification of a request that is "unclear", and if that clarification is not provided by the requestor then an agency need not respond. RCW 42.17.320. In addition, agencies shall, upon request for "identifiable" public records, make them promptly available. RCW 42.17.270. There are now three allowable reasons whereby agencies can legally deny a record request. First, the information is specifically exempted by statute; second, the request is for records which are not identifiable; or third, the request for records is unclear. The term "overbroad" was not used in the original act and neither "overbroad," "identifiable" nor "unclear" is defined in the code. The model rules proposed by your office to be included in the Washington Administrative Code indicate in section 44-14-04002 make some headway in defining identifiable public records. The language that "an identifiable record is one that agency staff can reasonably locate" is helpful as is the language that agencies may interpret requests relating to a topic to be for records "which directly and fairly address the topic." However, the definition is somewhat negated by the statement, "when an agency receives a 'relating to' or similar request, it should seek to clarify the request with the requestor" (Page 21, 04002 (2)). This also conflicts with section (6) which states that, "an agency can only seek a clarification when the request is objectively 'unclear'" (Page 24, 04003 (6)). In addition, constrictions on when an agency can seek a clarification is contrary to the communication required to provide the "fullest assistance" possible. The City recommends that both sentences be removed to promote concise and timely responses to

public disclosure requests. The City of Seattle found that in the last 33 years no request for records has ever been denied on the basis that a request was "overbroad". The Coalition for Open Government requested copies of all denials of public records requests, since 1972. The request asked for denials based on either the Hangartner case or denials on the ground that the request was overly broad or burdensome. In the last 33 years only three responses used the terms "broad" or "overly broad," and in all three cases the City asked for clarification or cited difficulty in establishing an identifiable record. No requests were denied. The terms "identifiable," "unclear" and "overbroad" need further delineation and clarification. Appointment of a public records officer Every department in the City of Seattle has an assigned public disclosure officer (PDO), and the names and contact information for each PDO are posted on the Mayor's web page. The City's policy is that agencies only respond to public disclosure requests with records that are in the custody of the department/agency receiving the request. PDOs routinely assist and refer citizens to other agencies if needed. Although the RCW definition of local agency includes any office, department, division, bureau, board, commission, or agency, the proposed model rules state in section 01001 that the "act requires an agency to coordinate responses to records requests across departmental lines". We recommend against this interpretation for the following reasons. A central Public Disclosure Officer for each regional entity would be impractical. The City of Seattle has over 10,000 employees, twenty-six departments and numerous boards and commissions. Professional detailed knowledge of the City's diverse services is requisite to providing meaningful assistance to citizens seeking public records. This cannot be provided by one officer. Shall we have a state-wide public disclosure officer? Most Public agencies go to great lengths to maintain web pages for the edification of the public. Public libraries also offer resources and researchers to assist the public. A centralized PDO may assist in pointing to various departments to assist a requestor, but ultimately the decision must be up to the requestor to make the determination. Agencies are the experts in their own records. Adding another layer of bureaucracy is not the solution. In addition, the balance of responsibility between the government and citizens in regards to public records requests needs to be maintained. Finding the right government agency for a particular need is oftentimes an exercise in frustration, even for government employees. However, placing the responsibility for public disclosure requests with one person would mean that the PDO would shoulder the legal responsibility for identifying and researching the requestor's needs. What are the consequences of failing to correctly direct an individual requestor? We also suggest language in the rules to suggest additional resources for records requests. Access to current (detailed) organizational charts that include agency functions would be very helpful. Existing records retention schedules already describe and index government records. As such they are an underutilized public disclosure reference tool. The rules should clarify that the PDO statute can apply to individual agencies and departments within a larger public entity. Lists of individuals for commercial purposes Current statutes do not give authority to any agency to release lists of individuals if the list will be used for commercial purposes. However, identity and motivation among requestors is not to be considered except where a statute distinguishes among persons entitled to have access to records. The rules reiterate the standard practice in Washington State – a requirement that requestors sign an affidavit stating that they will not use lists of individuals for commercial purposes. This is virtually unenforceable. We believe that the rules should allow that affidavits for releasing the lists of names gathered by government agencies can include the identity and motivation of the requestor as well as an affirmation by the requestor that the lists will not be used for commercial purposes. As you know, technological advances have made personal information collected from a variety of sources increasingly easy to link and merge. As a result, incursions into personal privacy have become problematic. Whole industries have sprung up to mine personal information while other industries have formed to protect it. As a

collector of substantial amounts of personal information, we have a responsibility to play a part in protecting the personal information of the citizens of this state. The taxpayers have paid for the collection of names; however, they paid for the collection of those names for a specific purpose. The overriding purpose of the public disclosure act is to provide access to information regarding an agency's performance of its duties, not to disclose personal information maintained by an agency for other private purposes. Electronic records The new language on processing requests for electronic records is comprehensive and clear. We appreciate the recognition that the process of redacting information from some electronic files can be prohibitive as well as threaten the integrity of the records. Protection of privacy Another privacy issue that should be addressed in the rules would be to limit the initial collection of personal data. This is particularly true in the case of electronic records such as databases. New systems should be designed with the functionality to handle public disclosure, privacy and other record keeping issues such as retention. Attorney Client Privilege The Hangartner case established that attorney-client privilege is not limited to records involved in litigation and recognized a general privilege for communications between government lawyers and governments employees who are seeking legal advice. The City of Seattle supports the attorney-client privilege exemption outlined in RCW 5.60.060 (2) as a stand-alone exemption that applies to government lawyers and their city agency clients. In a March 16, 2005 letter from the Washington Coalition for Open Government to the House and the Senate regarding SB 5735 and HB 1758, the coalition contends that there is no history of attempts to exempt records based on RCW 5.60.060 without the controversy test of RCW 42.17.310 (j). The coalition further states that the State should be "demanding evidence of the government lawyers who suggest that their position has been the only position for three decades," and that agencies across the state, "never denied a records request based on it." In fact, at least 19 requests were denied by the City of Seattle based on attorney client privilege where 42.17.310 (j), work product or controversy was not cited – 18 of which occurred prior to the Hangartner decision. These numbers have further significance when you take into consideration that this count was conducted on only the requests from 1972 through 2005 which were not destroyed according to the usual six year retention. The City of Seattle strongly opposes any legislation, opinions or language in the rules that weakens the attorney client privileges that governments have today. We look forward to the publication of the rules, and appreciate the opportunity to provide input. Sincerely, Nancy Craver, Public Disclosure Specialist Office of the Mayor City of Seattle